(19,099.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 448.

WALTER W. SMALL, PLAINTIFF IN ERROR,

vs.

SAMUEL O. RAKESTRAW.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 22, 1903.

1 In the Supreme Court of the State of Montana.

WALTER W. SMALL, Appellant,
vs.
SAMUEL O. RAKESTRAW, Respondent.

Foot & Pomeroy, counsel for appellant.
Sidney M. Logan, counsel for respondent.

Transcript on Appeal.

Appeal taken from the eleventh judicial district, Flathead county.

2 *Judgment Roll.*

Amended Complaint.

In the District Court of the Eleventh Judicial District of the State of Montana in and for the County of Flathead.

WALTER W. SMALL, Plaintiff,
vs.
SAMUEL O. RAKESTRAW, Defendant.

Plaintiff above named, by this, his amended complaint herein, alleges:

I.

That during the latter half of the year A. D. 1886, he, said plaintiff, settled and established his residence upon the following described lands, now situate, lying and being in the county of Flathead, State of Montana, to-wit:

The north half of the northwest quarter (N. ½ N.W. ¼) and the southwest quarter of the northwest quarter (S. W. ¼ N.W. ¼) of section number thirty-four (34), and the southeast quarter of the northeast quarter (S. E. ¼ N. E. ¼) of section number thirty-three (33), in township number thirty (30) north of range number twenty (20) west; that at said time plaintiff was a native born citizen, and ever since has continued to be a citizen of the United States; that at said time said described lands were a part of the unappropriated public
3 lands of the United States; that at said time plaintiff was not the owner or proprietor of more than one hundred sixty acres of land in any State or Territory, and was then over the age of twenty-one years; that he had never had, and other than is herein alleged never has had the benefit of or made any entry under the homestead laws of the United States.

II.

That at the time plaintiff settled and established his residence upon said lands as aforesaid the same and all thereof were public unsurveyed, unappropriated, non-mineral lands of the United States, and did not become subject to entry and filing until on or about the 16th day of August, A. D. 1891, on which day the approved plat of the survey thereof was filed in the United States land office of the district in which said land was then situate, to-wit, at the land office at Missoula, Montana; that on or about the 17th day of August, A. D. 1891, at said land office, plaintiff applied to and did make homestead entry of said land and all thereof under section 2289 of the Revised Statutes of the United States, making and filing in support thereof the affidavit then required by law and the rules and regulations of the Department of the Interior of the United States; that such settlement, application and entry were honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation but with the intent faithfully and honestly to comply with all the requirements of the law as to settlement, residence and cultivation
4 necessary to acquire title to said lands under the homestead laws of the United States; that he was not acting and did not act as agent of any person, corporation or syndicate to give them the benefit of said land, or any part thereof, or any timber thereon, that he did not apply to enter the same, or any part thereof, for the purpose of speculation, but in good faith to secure and obtain a home for himself, and that he never has made, either directly or indirectly, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself, said plaintiff.

III.

That on or about the 26th day of January, A. D. 1892 said plaintiff applied to and did make and offer final proof of his said homestead entry and of his residence upon and cultivation and improvement of said land, showing therein a satisfactory and full compliance with the law, and that but for the acts of said defendant herein complained of patent to said land from the United States would have been duly issued to said plaintiff therefor; that from the time of said settlement in the year 1886 until long after submitting and offering his final proof as aforesaid, said plaintiff continued to reside upon, cultivate and improve said land, in good faith, and but for the aforesaid wrongful acts of said defendant would have continued so to do.

5 IV.

That on or about the 26th day of March, 1892 said defendant, Samuel O. Rakestraw, filed an affidavit of contest against the said homestead entry of said plaintiff, in which he alleged that said plaintiff had never made settlement upon said tracts of land or any of the same; that for several years last past said plaintiff had resided at or near Demersville, about sixteen miles from said land; that he, said defendant, had made valuable improvements upon said lands, including dwelling house, barn and well, long prior to the date of said entry by said plaintiff; that he was prevented from continuance of his residence upon said lands and further improving the same by said plaintiff, who shot his horses down in the field while "seeding," destroyed his buildings and threatened to shoot him unless he desisted from making further improvements upon said land; that his right to said land was initiated prior to said plaintiff's, that at the time of the initiation of the right of said plaintiff upon said land the same was unsurveyed and said plaintiff was ineligible to initiate a right for the reason that he was residing upon a pre-emption claim to which he subsequently perfected title by making final entry.

That upon said contest so initiated by said defendant a hearing was had before the register and receiver of the United States land office at Missoula, Montana, upon testimony taken therein on the seventh day of May, 1892, in support of and against said
6 contest, and said register and receiver thereafter recommended said homestead entry of said plaintiff for cancellation; from this decision said plaintiff, as such homestead claimant, duly appealed to the Commissioner of the General Land Office, at Washington, D. C., and on or about the 18th day of October, A. D. 1892, said Commissioner reversed the said decision of the said register and receiver, and allowed said entry to remain intact and uncancelled, and dismissing said contest, rendering therein his decision in which he found the following facts, and no others, to wit: "That the land was first opened to filing August 16th, 1891, and that he (said plaintiff) proved up on a pre-emption claim in June, 1886," and that said plaintiff "established residence on the land in dispute in August, 1886;" "that contestant has failed to sustain the charges alleged in the affidavit of contest filed March 26th, 1892, except that he may have been prevented from continuing his residence on said land by Small's actions, and threats, and that Small (plaintiff) may have shot his horses as alleged; and that the charge that Small has resided at Demersville for several years is only partly borne out, as the evidence seems to show that he has resided there only a greater part of the year 1891." Said Commissioner further found as follows, to wit: "I do not find any testimony to sustain your finding that speculation appears in Small's motives. * * * It seems in this case that Small on account of ill health and poverty had been unable to cultivate and

improve the land for a large part of the time since settlement,
and that it was necessary for him to work elsewhere
7 to earn the money to improve the same. It also seems that
the land was cultivated under his direction every year after he made homestead entry except the year 1891, when he alleged he left to avoid personal difficulty with Rakestraw (defendant herein), and when it seems that W. E. Walker, who went there to break the land for him, was ordered off by contestant. It also seems that from the substantial nature of his improvements, which seem to be worth about $800, and the amount of personal labor he has bestowed in improving same that Small has shown a *bona fide* intention to return to make the land his home. It also seems that — has fifty acres reduced to state of cultivation and while his visits were, with a few exceptions, one of which was when he spent seven months on the land, of short duration and at intervals some time apart, still, I do not think your finding of bad faith and non-compliance with law as to occupancy are warranted by the evidence."

That said Commissioner further found "That 'the maintainance of a residence, established in good faith, is not inconsistent with absence rendered necessary to secure support and improve the land,' and in case of Geo. F. Lutz (9 L. D. 266) it is held that 'residence on land and actual presence thereon are not controvertible or synonymous terms, and residence being once established, subsequent absences, *animo revertendi*, and for a lawful purpose not indicating an intent to abandon, do not break the continuity of such residence.'

That 'the contestant having failed to sustain his charges, the
8 question of cancelling the entry and forfeiting the entryman's
claim becomes one between him and the Government alone.'
For the reasons above stated the contest of Rakestraw is dismissed."

Plaintiff alleges that the foregoing are all the findings of fact and of law made and found by said or any Commissioner of the General Land Office in said or any contest relating to said lands.

V.

That thereafter the said defendant, as such contestant, appealed from the decision of the Commissioner aforesaid, to the Secretary of the Interior of the United States, and on or about the 28th day of March, 1895, rendered his decision in said matter, reversing the said decision of the Commissioner, which said decision is in words and figures following, to-wit:

"20-559. DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 28, 1895.

SAMUEL O. RAKESTRAW
vs.
WALTER W. SMALL.

The Commissioner of the General Land Office.

SIR: The plaintiff in the case of Sam'l O. Rakestraw *vs.* Walter W. Small, appeals from your office decision of October 18, 1893, wherein you dismiss his contest against Small's entry for the N. ½ of the N. W. ¼, the S. W. ¼ of the N. W. ¼, sec. 34, and the S. E. ¼ of the N. E. ¼ of sec. 33, tp. 30 N., R. 20 W. Missoula land district, Montana.

January 21, 1892, plaintiff filed his affidavit of contest
9 against the defendant's homestead entry charging that the entryman had failed to comply with the law as to residence. The testimony of Small, himself, is that he never voted in the precinct in which his homestead entry lies, but did vote at other points a long distance from his homestead at least twice during the time he claims he was seeking to maintain residence upon the land. He runs a carpenter shop in town, and, to use his own words, "determined to return to the ranch only often enough to keep a good showing of habitation." His excuse for that was that the plaintiff threatened him with violence if he undertook to stay on the land.

Without passing upon any other question it is enough to say that a residence for voting purposes in another precinct from the land, precludes an entryman from claiming residence at the same time, on the land for homestead purposes. George T. Barnes (4 L. D. 62); Hart *v.* McHugh (17 L. D. 176); Edwards *vs* Ford and O'Connor, decided June 18, 1894.

Your office decision is reversed and Small's homestead is canceled. Herewith are returned the papers in the case.

Very respectfully, HOKE SMITH, *Secretary.*"

VI.

That the facts are, and by the evidence submitted at said hearing and considered by said Commissioner and Secretary are shown to be that said plaintiff voted at Granite in the county of Granite, State
then Territory of Montana, at the election held in said State,
10 then Territory in the fall of the year A. D. 1889, and that at the general election in the fall of the year A. D. 1890 he voted at the town of Bonner in Missoula county, Montana, in which last named county said land was then situate and being; that after voting at said town of Granite said plaintiff returned to, resided upon, improved and cultivated said land during the year A. D. 1890, and prior to any pretended settlement of said defendant thereon; that in December A. D. 1890, after voting at said Bonner, plaintiff returned to said land; that these two were the only places at which

plaintiff voted between the time of his said settlement upon said land and the fall of A. D. 1892, after he had made his final proof as aforesaid; that at the time plaintiff voted at said Bonner under the laws of said State of Montana a resident of said county of Missoula could vote at any one precinct therein, without regard to the particular precinct in which he then resided.

VII.

That the action of said Secretary of the Interior in holding that, "Without passing upon any other question it is enough to say that a residence for voting purposes in another precinct from the land, precludes an entryman from claiming a residence at the same time on the land for homestead purposes," in rendering the aforesaid decision and holding said homestead entry of said plaintiff for cancellation and cancelling the same, was an open violation of the rights of said plaintiff, and a gross mistake and misapplication and misconstruction of the law, in as much as the law did not
11 then require said plaintiff to vote in the precinct of his residence, wherein said land was situate and being.

VIII.

That pursuant to said decision of said Secretary of the Interior plaintiff's said homestead entry was cancelled on the 12th day of July, 1895, and said defendant was permitted to make and did make homestead entry of said land on or about the 19th day of July, 1895; that thereafter, and on or about the 26th day of February, 1897, under said homestead entry so made by said defendant the patent of the United States was duly issued to said defendant for the said land and all thereof; that but for the mistake in and misconstruction of the law made by said Secretary of the Interior in his said decision as aforesaid patent for said land would have been issued to this plaintiff by the United States.

IX.

That at the time said plaintiff made final proof for the said land, on said 26th day of January, 1892, he paid and delivered to the receiver of the United States land office at Missoula, Montana, the purchase price therefor and all fees and costs connected therewith and demanded certificate for patent therefor, which would have been issued but for said contest instituted as aforesaid by said defendant; that by reason of his said acts of settlement, cultivation, improvement and residence, and said final proof by him made, said plaintiff acquired under the laws of the United States a vested right and interest in and to said lands, and each and every
12 part thereof; that he has never, in any manner, alienated or parted with said interest or right, or any part thereof; and that he is now the equitable owner of said lands, and entitled to the

legal title and ownership thereof and the absolute and immediate possession of the same and every part thereof.

X.

That the aforesaid decision of the Secretary of the Interior is the only decision, opinion, finding of fact or conclusion of law ever rendered, given, made or found by said or any Secretary of the Interior in said contest or any contest relative to said lands or any part thereof.

XI.

That the fact is and the evidence submitted at said hearing and considered by said Commissioner and said Secretary is shown to be, that said defendant did not enter upon or attempt to settle upon said land or any thereof until some time in December, A. D. 1890.

Wherefore, plaintiff prays the judgment and decree of said court as follows, to-wit:

1. That the said plaintiff is the equitable owner and entitled to the legal title and the possession of said lands, and all thereof, and that the said defendant holds the legal title and possesses the same in trust for the use and benefit of said plaintiff.

2. That said defendant be ordered and decreed to make and
13 execute to said plaintiff a good and sufficient deed of conveyance of said lands and each and every part thereof, and should he neglect or refuse so to — that a commissioner be appointed by said court to do so for and in the name of said defendant, and that he immediately deliver to plaintiff possession of all of said lands.

3. For such other and further relief as to the court shall seem meet and just in the premises, and for his costs and disbursements herein.

Dated March 24th, 1898.

FOOT & POMEROY,
Attorneys for Plaintiff.

Verification.
Filed April 2, 1898.

Demurrer to Amended Complaint.

Title of case.

Now comes the defendant in the above entitled action and demurs to the complaint of plaintiff as amended herein upon the grounds:

I.

That said court has no jurisdiction of said cause or the subject matter thereof.

II.

That said complaint does not state facts sufficient to constitute a cause of action.

B. J. McINTIRE,
Attorney for Defendant.

Filed April 11, 1898.

14 *Order Sustaining Demurrer.*

District court journal, nineteenth day, March term, 1899, May 20, 1899.

Title of case.

This cause having been heretofore heard on defendant's demurrer to plaintiff's amended complaint and taken under advisement by the court, now, at this time, the court, having fully considered said demurrer, sustains the same, to which ruling of the court counsel for plaintiff excepts.

Plaintiff granted twenty days to file 2nd amended complaint.

D. F. SMITH, *Judge.*

Judgment by the Court.

Title of case.

This cause came regularly on for hearing on the sixth day of August, A. D. 1898, on the defendant's demurrer to the plaintiff's amended complaint, Messrs. Foot & Pomeroy appearing as attorneys for plaintiff and S. M. Logan, Esq., as attorney for said defendant; and the court having heard and duly considered the same and the arguments of the respective counsel, on the twentieth day of May, A. D. 1899, at the regular March A. D. 1899 term of said court, made and rendered its decision on said demurrer, therein and thereby sustaining the same and granting to said plaintiff twenty days in which to serve and file second amended complaint, and said plaintiff having elected to stand on said amended complaint
15 and not to plead further, and no further amended complaint being filed within the time specified in said decision, on motion of defendant's attorney, made in open court, on the 19th day of June, A. D. 1899,

It is ordered, adjudged and determined that said demurrer be sustained and said action be and hereby is dismissed and that said defendant have and recover of said plaintiff his costs and disbursements herein, taxed and allowed at seven dollars and fifty cents.

Done in open court this twenty-sixth day of August, A. D. 1899.

By the court,

D. F. SMITH, *Judge.*

Filed August 26th, 1899.
Entered August 26th, 1899.
Certificate to judgment roll.
Judgment roll filed August 26th, 1899.

Notice of Appeal.

Title of case.

Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of this State, from the judgment therein made and entered, in the said district court, on the twenty-sixth day of August, A. D. 1899, in favor of the defendant in said action and against said plaintiff, and from the whole thereof.

16 Dated this 3rd day of July A. D. 1900.

FOOT & POMEROY,
Attorneys for Plaintiff.

To the clerk of said district court, and to Sidney M. Logan, attorney for defendant, Samuel O. Rakestraw.

Service of the foregoing notice is hereby admitted and copy had this 3rd day of July, 1900.

SIDNEY M. LOGAN,
Attorney for Defendant.

Filed July 3rd 1900.

Certificate of Clerk.

In the District Court of the Eleventh Judicial District of the State of Montana in and for the County of Flathead.

WALTER W. SMALL, Plaintiff,
vs.
SAMUEL O. RAKESTRAW, Defendant.

I, C. A. Goodrich, clerk of the above entitled court, do hereby certify that I have compared the within and foregoing transcript on appeal with the original papers in the above entitled case, now on file in my office, and that the said transcript contains correct copies of said original papers. I further certify that an undertaking on appeal, in due form, was, on the 3rd day of July, 1900, properly filed in said case.

In witness whereof, I have hereunto set my hand and
17 & 18 affixed the seal of said court this the 22nd day of August A. D. 1900.

[SEAL.]

C. A. GOODRICH,
Clerk of the District Court.

19 STATE OF MONTANA:

In the Supreme Court, June Term, 1903.

WALTER W. SMALL, Plaintiff and Appellant,
vs.
SAMUEL O. RAKESTRAW, Defendant and Respondent. } No. 1592.

Submitted May 29, 1903; decided June, 1903.

Filed June 16, 1903.

HENRY G. RICKERTS, *Clerk.*

20 *Opinion by Mr. Commissioner Callaway.*

On demurrer to complaint. The substance of the complaint is that in a contest for a tract of land between the plaintiff here, Walter W. Small, and the defendant here, Samuel O. Rakestraw, before the Land Department, the Secretary of the Interior erroneously decided in favor of Rakestraw; and that had it not been for the wrongful acts of the defendant and the erroneous ruling of the Secretary, patent for the land would have issued to plaintiff. The prayer of the complaint is that the defendant shall be decreed to hold the title to the land in trust for the plaintiff, and convey it to him.

To this complaint the defendant interposed a demurrer alleging that "the court has no jurisdiction of the cause or the subject matter thereof," and that the complaint does not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and the plaintiff refusing to amend, judgment was entered for defendant for costs. From this judgment the plaintiff appeals.

Plaintiff alleges that he settled upon the land in controversy during the latter part of the year 1886, and resided thereon continuously until after he submitted final proof upon his homestead claim to the Land Department. The lands became subject to entry on August 16, 1891, under the laws of the United States, and on the day following the plaintiff entered the same under the homestead law, and on January 26, 1892, made final proof in further-
21 ance of such entry.

March 26, 1892, Rakestraw filed an affidavit of contest against appellant's homestead entry, charging that Small had failed to comply with the United States law as to residence. The hearing was had before the register and receiver of the local land office, which resulted in favor of Rakestraw. Small thereupon appealed to the Commissioner of the General Land Office, who found in his favor and ordered the contest dismissed. Rakestraw then appealed to the Secretary of the Interior, who reversed the decision of the Commissioner, and ordered Small's homestead entry cancelled. In giv-

ing his opinion the Secretary said: "Plaintiff filed his affidavit of contest against the defendant's homestead entry charging that the entryman had failed to comply with the laws as to residence. The testimony of Small, himself, is that he never voted in the precinct in which his homestead entry lies, but did vote at other points a long distance from his homestead at least twice during the time he claims he was seeking to maintain residence upon the land. He runs a carpenter shop in town, and, to use his own words, 'determined to return to the ranch only often enough to keep a good showing of habitation.' His excuse for that was that the plaintiff threatened him with violence if he undertook to stay on the land.

Without passing upon any other question it is enough to say that a residence for voting purposes in another precinct from the land, precludes an entryman from claiming residence at the same time, on the land for homestead purposes. George T. Barnes (4 L.
22 D. 62); Hart *v.* McHugh (17 L. D. 176); Edwards *vs.* Ford and O'Connor, decided June 18, 1894."

Plaintiff contends that in saying "a residence for voting purposes in another precinct from the land, precludes the entryman from claiming residence at the same time, on the land for homestead purposes," the Secretary committed such "a gross mistake and misapplication and misconstruction of the law," as brings this case within the rule that whenever it is made to appear to a court of equity that the officers of the Land Department have issued a patent to the wrong person by reason of a mistaken application of the law to the facts in the case, the court will, in a proper proceeding, interfere, and control the determination of the department so as to secure the just rights of the parties injuriously affected.

In coming to his determination as to the plaintiff's residence upon the land and the *bona fides* of his settlement thereon the Secretary passed upon questions of fact whereof he was the exclusive judge, in the absence of fraud or imposition, and neither is shown in this case.

Plaintiff says that the Secretary was in error in drawing a conclusive presumption of abandonment from the fact that plaintiff voted in Granite and Bonner, precincts other than the one in which his homestead claim was. Granite is in another county.

What other evidence touching the question of plaintiff's
23 residence for voting purposes may have been before the Secretary we do not know, as it does not appear from the complaint that the only facts before him on that subject were those relating to plaintiff's voting at Granite and Bonner.

The question of residence is one of fact. (McHarry *v.* Stewart, 35 Pac. 141; Stewart *v.* McHarry, 159 U. S. 643.)

From the facts before him the Secretary decided that the plaintiff had not resided upon his homestead continuously for the five years prior to January 26, 1892; on the contrary, he found that the plaintiff had established a residence elsewhere for voting purposes during that time. And we think the Secretary's statement that "*a*

residence for voting purposes in another precinct from the land, precludes an entryman from claiming residence at the same time, on the land for homestead purposes," is correct.

Whether the Secretary erred in his finding upon the facts submitted to him is immaterial in this inquiry. It makes no difference what our conclusion on the subject might be. (Bohall *v.* Dilla, 114 U. S. 47.)

"The officers of the Land Department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practised upon them or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a con-
24 troversy arises between private parties founded upon their decisions; but for mere errors of judgment upon the weight of evidence in a contested case before them the only remedy is by appeal from one officer to another of the department." (Shepley *v.* Cowan, 91 U. S. 340, quoted in Moore *v.* Robbins, 96 U. S. 530.)

In Lee *v.* Johnson, 116 U. S. 48, Mr. Justice Field speaking for the court, said: "Without going into any detail of the evidence presented to the Commissioner and the Secretary of the Interior, but taking the general statement of its nature, which we have given, it is clear that their attention was drawn by it to the character of the settlement of Johnson, and that they considered whether his entry was made to acquire a home for himself or for his son-in-law, whether his residence had been sufficiently personal and continuous to save and perfect any right, if in fact he had ever initiated any, and whether or not he had abandoned the land. The findings of the Secretary upon any of these matters must be taken as conclusive, in the absence of any fraud and imposition such as we have mentioned. Upon this point it is only necessary to refer to the cases where this conclusive character of the action of the department upon matters of fact cognizable by it, has been expressly affirmed. Johnson *v.* Towsley, 13 Wall. 72; Shepley *v.* Cowan, 91 U. S. 330, 340; Moore *v.* Robbins, 96 U. S. 530, 535; Quinby *v.* Conlan, 104 U. S. 420, 426; Smelting Co. *v.* Kemp, 104 U. S. 636, 640; Steel *v.*
25 Smelting Co., 106 U. S. 447, 450. (And see Murray *v.* Montana Lumber and Manufacturing Company, 25 Mont. 14; Sanford *v.* Sanford, 139 U. S. 642.)

"It would lead to endless litigation and be fruitful of evil if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their consideration." (Quinby *v.* Conlan, 104 U. S. 430.)

The following language in Moore *v.* Northern Pacific Railroad Company, 18 Mont. 290, is applicable to this case: "Counsel for appellant contends that decisions of the Secretary of the Interior, made solely on the construction of the law, may be attacked in this pro-

ceeding; but it nowhere appears that the land contest between plaintiff and defendant was determined by the Secretary of the Interior upon a construction of the law only. As far as the record shows the Secretary passed upon the facts, and we cannot say that his decision was arrived at from a construction of the law only. Decisions are generally rendered upon a consideration of both law and facts." (See Power *v.* Sla, 24 Mont. 243.)

The plaintiff contends, however, that a settlement cannot be made upon public lands already occupied, and therefore the defendant had no right to obtain the patent for the reason that he initiated his claim to the land in controversy by trespass upon the plaintiff.

In answer to this contention we quote the following from the opinion of the court in Bohall *v.* Dilla, *supra:*

26 "To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the Government, and that in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant. Smelting Co. *v.* Kemp, 104 U. S. 636, 647; Boggs *v.* Merced Mining Co., 14 Cal. 279, 363. It is therefore immaterial for the decision of this case what our judgment may be upon the conclusions of those officers as to the possession of the patentee."

We are of the opinion that the complaint does not state facts sufficient to invoke the action of a court of equity, and therefore the judgment should be affirmed.

LEW L. CALLAWAY,
Commissioner.

We concur:

JNO. B. CLAYBERG,
Chief Commissioner.
W. H. POORMAN,
Commissioner.

26½ *Per Curiam:*

For the reasons given in the foregoing opinion the judgment is affirmed.

THEO. BRANTLY,
Chief Justice.

GEO. R. MILBURN,
Associate Justice.
WM. L. HOLLOWAY,
Associate Justice.

27 In the Supreme Court, State of Montana.

WALTER W. SMALL, App'l't,
vs.
SAMUEL O. RAKESTRAW, Resp't. } No. 1592.

This cause this day came *of* for the judgment and decision of the court.

Whereupon, on consideration, it is now here ordered and adjudged that the judgment of the court below made and entered on the 26th day of August, 1899, be and the same is hereby affirmed at the cost of appellant.

Opinion prepared by Mr. Commissioner Callaway.

All the justices concurring.

28 UNITED STATES OF AMERICA, *ss:*

To Samuel O. Rakestraw, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Montana, wherein Walter W. Small is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Theo. Brantly, chief justice of the supreme court of Montana, this fourth day of September, in the year of our Lord one thousand nine hundred and three.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

29 On this eleventh day of September, in the year of our Lord one thousand nine hundred and three, personally appeared John A. Donahue before me, the subscriber, and makes oath that he was, on the 11th day of September, 1903, over 21 years old, that he delivered a true copy of the within citation to said Samuel O. Rakestraw, defendant in error therein named, on the 8th day of September, 1903, in the county of Flathead, State of Montana.

JOHN A. DONAHUE.

Sworn to and subscribed the 11th day of September, A. D. 1903.

[Notarial Seal C. H. Foot, Flathead County, Montana.]

C. H. FOOT,
Notary Public in and for Flathead County, Montana.

[Endorsed:] Filed Sept. 14" 1903. Henry G. Rickerts, clerk.

30 UNITED STATES OF AMERICA, *ss*:

[Seal United States Circuit Court, District of Montana.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Montana, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Walter W. Small, plaintiff and appellant, and Samuel O. Rakestraw, defendant and respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or
31 statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Walter W. Small, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of September, in the year of our Lord one thousand nine hundred and three.

GEO. W. SPROULE,
Clerk of the Circuit Court of the United States
for the District of Montana.

Allowed by—
THEO. BRANTLY,
Chief Justice of the Supreme Court
of the State of Montana.

[Endorsed:] Filed Sept. 5, 1903. Henry G. Rickerts, clerk.

32 Know all men by these presents, that we, Walter W. Small, as principal, and David R. Peeler and J. Harrington Edwards, as sureties, are held and firmly bound unto Samuel O. Rakestraw in the full and just sum of five hundred (500) dollars, to be paid to the said Samuel O. Rakestraw his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this twenty-seventh day of August, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a supreme court of the State of Montana in a suit depending in said court, between Walter W. Small, plaintiff and appellant and Samuel O. Rakestraw, defendant and respondent a judgment was rendered against the said Walter W. Small and the said Walter W. Small having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Samuel O. Rakestraw citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Walter W. Small shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WALTER W. SMALL. [SEAL.]
DAVID R. PEELER. [SEAL.]
J. HARRINGTON EDWARDS. [SEAL.]

Sealed and delivered in presence of—

As to Walter W. Small
L. C. HAYCOCK.

As to David R. Peeler and J. Harrington Edwards,
C. H. FOOT.

Approved by—

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

[Endorsed:] Copy Filed Sept. 4" 1903. Henry G. Rickerts clerk.

33 In the Supreme Court of the State of Montana.

WALTER W. SMALL, Appellant,
vs.
SAMUEL O. RAKESTRAW, Respondent. } Certificate of Clerk.

I, Henry G. Rickerts, clerk of the above entitled court do hereby certify that the foregoing is a full, true and perfect transcript of the record and proceedings in the above entitled case lately pending in said court, and is certified by me in obedience to the command of the writ of error herewith returned, with which writ is also returned the original citation with proof of service thereon and the original writ of error in said case.

Witness my official signature and the seal of said court at the city of Helena, in said State of Montana, this 13″ day of October, in the year of our Lord, one thousand nine hundred and three.

[Seal Supreme Court, State of Montana.]

HENRY G. RICKERTS,
Clerk of the Supreme Court of the State of Montana.

Endorsed on cover: File No. 19,099. Montana supreme court. Term No. 448. Walter W. Small, plaintiff in error, *vs.* Samuel O. Rakestraw. Filed October 26th, 1903. File No. 19,099.